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Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1102

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 57,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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No.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 57,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, International Union of Operating Engineers, Local 57, a labor organization in the state of Rhode Island, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on December 12, 1972.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit, entitled "MEMORANDUM AND ORDER", dated December 12, 1972, is printed in Appendix A hereto

(p. 30). This opinion has not been reported, either officially or unofficially.

Jurisdiction

The judgment of the Court of Appeals viz., the "MEMORANDUM AND ORDER" referred to above, was entered on December 12, 1972, and is set forth in Appendix A hereto (p. 30). On January 2, 1973, Hon. William J. Brennan, Jr., signed an order "that the time for filing a petition for writ of certiorari" in this case (No. A-697) be extended to and including February 10, 1973. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

I. Whether a mass of petitioner's records were "seized" and continue to be held in violation of the Fourth Amendment?

II. Whether the proceedings in which the federal District Court, and the Court of Appeals, approved the Department of Justice's authority to "seize" and hold this mass of petitioner's records were so totally devoid of evidentiary support as to render the "seizure" unconstitutional also under the "due process" clause of the Fifth Amendment?

Constitutional Provisions Involved

The pertinent constitutional provisions involved are:

U. S. CONSTITUTION, AMENDMENT IV (1 U.S.C.)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. CONSTITUTION, AMENDMENT V (1 U.S.C.)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Statement of the Case

On October 20, 1970, a federal grand jury, hereinafter sometimes referred to as the "first" grand jury, was empanelled for the district of Rhode Island. (R. 50, 56, 85).

The First Grand Jury

This first grand jury on Friday, March 19, 1971, issued a broad subpoena duces tecum to Local 57, International Union of Operating Engineers, calling on its President, or other authorized custodian of its records, to produce in effect all its records covering the five years between January 1, 1966, and December 31, 1970. This subpoena commanded (R. 4, 5):

"You are hereby commanded to appear in the United States District Court for the District of Rhode Island at 223 Federal Building and Courthouse in the city of Providence on the 25th day of March, 1971 at 9:30 o'clock A.M. to testify before the Grand Jury and bring with you:

(1) Records of the International Union of Operating Engineers, Local 57, for the period beginning January 1, 1966 and ending December 31, 1970, to include all vouchers, worksheets, audit reports, invoices and supporting documents relating to the invoices, receipts, minutes of meetings including those of the Executive Board, resolutions, ledgers, journals, accounts receivable, accounts payable, bank statements, cancelled checks, deposit slips, financial statements, records of loans, records of mortgages, records of ownership of property real and personal, deeds, records of trusts, records of investments, correspondence and memoranda pertaining to receipts and disbursements, records of cash disbursements, surety bonds required under Section 502(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 502(a) and 29 CFR 453, and agreements and contracts to purchase said surety bonds.

(2) The list of the complete membership of Local 57, International Union of Operating Engineers, for the period beginning January 1, 1966 and ending December 31, 1970, to include but not limited to regular book membership, and permit membership.

(3) The list of the officers and employees of Local 57, International Union of Operating En-

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gineers for the period beginning January 1, 1966 and ending December 31, 1970.

(4) All payroll records of Local 57, International Union of Operating Engineers relating to officers and employees for the period beginning January 1, 1966, and ending December 31, 1970.

(5) All records of Local 57, International Union of Operating Engineers relating to the employment of Local 57's membership by private contractors.

On the following Wednesday, March 24, 1971, Local 57 filed a pleading with the federal District Court for Rhode Island seeking an order quashing or modifying this subpoena. (R. 1-11). Citing *Hale* v. *Henkel,* 201 U.S. 43, 75-77 (1906), this pleading attacked the subpoena as "so broad and unlimited in its command to produce practically all records of Local 57 covering a five-year period" as to violate the Fourth Amendment. (R. 2-3)

On the same day the District Court held a hearing on this pleading. (R. 13-49) The Union's attorney argued that so broad a subpoena was unreasonable, and violative of the Fourth Amendment, absent any explanation from the Government "as to why they have framed so broad a subpoena which in effect amounts to all records for a five-year period." (R. 20, 21)

The Union's attorney cited to the Court (R. 15-18):

Federal Trade Commission v. *American Tobacco Company,* 264 U.S. 298;

Application of Certain Chinese Family Benevolent and District Associations, 19 F.R.D. 97.

The Union's attorney also argued that the District Court had an "obligation . . . to inquire into the reasonableness

of a broadly stated grand jury subpoena". (R. 15, 16)

A Department of Justice Attorney (Gerald McDowell) argued that the District Court had no obligation to inquire why so broad a subpoena was required; he stated that the Fourth Amendment required only (R. 22, 23):

> (1) That the Grand Jury be acting within the scope of its duties; and
>
> (2) Some "specificity" in the documents sought.

At no point during this hearing in March, 1971, did the Department of Justice attorney identify the violation, or violations, of federal law supposedly under investigation by the federal grand jury that had issued this subpoena. He offered no evidence to the District Court, either documents or testimony of witnesses. Not even an affidavit was offered to the District Court in support of the "reasonableness" of the broad demand of this grand jury subpoena for records of Local 57 covering this 5-year period.

The Union's attorney also argued that although the scope of a federal Grand Jury inquiry into possible violations of federal law is broad, a federal Grand Jury, being an arm of the federal government, is limited by the Fourth Amendment to what is "reasonable" whenever it demands records or "papers" (R. 27-30).

The District Court (Judge Edward W. Day) delivered a brief oral opinion from the bench denying the Union's motion to quash the subpoena and resulting in an order requiring compliance with the subpoena. (R. 30-34, 49) This oral opinion is hereinafter set out in its entirety (R. 32, 33):

> "The Court: This matter is before me on the motion of John A. White, Jr.. President of International

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Union of Operating Engineers, Local 57, for the entry of an order quashing or modifying a subpoena duces tecum that was served upon him on March 19, 1971 (erroneously dated January 19, 1971).

At the instance of the United States an examination of the subpoena duces tecum indicates that it requires the plaintiff to produce before a local federal grand jury certain records of the International Union of Operating Engineers, Local 57, covering a five-year period beginning January 1, 1966 and ending December 31, 1970. In said subpoena duces tecum there is a particularized description of the records, the production of which is sought by the subpoena. The subpoena, as I indicated before, was served on March 19, 1971 and directed Mr. White to produce these records at 223 Federal Building, in this courthouse, on March 25, 1971. In other words, a period of six days would elapse between the service of the subpoena duces tecum and the production of the records.

In support of the movant's motion it is alleged, first, that the subpoena is so broad and unlimited in its command to produce practically all records of Local 57 covering a five-year period that enforcement of the subpoena would constitute an unreasonable search and seizure in violation of Amendment IV of the Constitution; and, second, that said subpoena is unreasonable and oppressive within the meaning of Rule 17(c) of the Federal Rules of Criminal Procedure in that it commands the Union to produce some records that Local 57 did not maintain within this five-year period; other records not in the possession or custody of Local 57, but either nonexistent or in the possession or custody of others, including the Internal Revenue Service on the date the subpoena was

served; and, as a further objection, the movant contends that the subpoena calls for the production of other records that are essential to the continued regular functioning of Local 57; and, finally, that the subpoena should be quashed or modified in that it commands the accumulation and production of this extensive list of records to be completed by three and one-half business days after the service of said subpoena.

The motion to quash or modify is supported by the affidavits of John A. White, Jr. and James R. McGowan, Esq., attorney for Local 57.

In support of the motion counsel for the movant cites the case of *Hale* v. *Henkel,* 201 U.S. 43, (1906), for the proposition that a request, such as the one being made by the subpoena here, constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. In oral argument counsel for the movant contends that because the subpoena duces tecum requires the production of these records for a period of five years, it apparently is, per se, unreasonable within the Fourth Amendment to the Constitution.

I am disinclined to adopt that reasoning. An examination of the subpoena reveals that it itemizes, I might say, records, the production of which is sought. From its language it is clear that what is sought are the documents that are specifically described in the subpoena and any correspondence or memoranda pertaining to the receipts and disbursements of Local 57 during the period involved.

In the affidavit of Mr. White he deposes that he has not been given sufficient time to comply with the subpoena; that some of the records may not be in existence; and, further, that some of the records described

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may not have been kept during the period involved.

Insofar as those contentions are concerned, those are matters which may be explained to the grand jury. If counsel for the Government are satisfied that the explanation is sound and a document is not in existence, of course, it cannot be produced.

Certainly in my humble opinion I do not consider the request too broad. It covers a period of five years, it is true. It may take some time for Mr. White and those working with him to accumulate these records and have them ready for production if they are not kept in one place. I don't think that is any ground for quashing the subpoena or modifying it.

In my opinion the plaintiff [*Local 57*] *has failed to sustain the burden imposed upon him to establish that this subpoena duces tecum is unreasonable within the Fourth Amendment to the Constitution of the United States.* I do suggest to counsel that a cooperative position be taken with the Government; and I am sure that if further time is needed to collect all of the records that are directed to be produced, it will be given. If it isn't given willingly, an application can be made to the Court for some extension of time in which to comply with the subpoena duces tecum.

The motion to quash or modify the subpoena duces tecum is denied. The movant's objection to the Court's ruling is noted." (Emphasis supplied.)

The subpoena was complied with on April 1, 1971.

Some five months thereafter, on September 8, 1971, the federal grand jury that had subpoenaed these records was discharged from further service, under Rule 6(g), Rules of Criminal Procedure for the United States District

Courts,[1] on the motion of the United States Attorney for the District of Rhode Island. (R. 50, 56, 62, 67, 85)

The order discharging this grand jury, on September 8, 1971, made no disposition of, or reference to, records previously subpoenaed by it. (R. 56, 68, 69, 85).

The mass of Local 57 records, covering the 5-year period between January 1, 1966, and December 31, 1970, previously subpoenaed in March of 1971 by the federal grand jury that went out of existence on September 8, 1971, were held after September 8, 1971, by the United States Attorney for Rhode Island, without authorization from the Court and without the approval or even the knowledge of Local 57. (R. 56, 57)

The Second Grand Jury

On November 18, 1971, an attorney for Local 57[2] (Harold C. Arcaro, Jr.) wrote the following letter to the United States Attorney for Rhode Island (Ex. 4; R. 57, 67, 68, 76, 77, 85):

> "Dear Mr. Almond,
>
> Sometime ago you indicated to me, in response to my request, that since the records of the Local 57 Operating Engineers Unit which were made available in connection with grand jury proceedings were no longer required by you, in as much as copies thereof had been made, said records would be returned forthwith.

[1] Rule 6(g) provides: "A grand jury shall serve until discharged by the Court but no grand jury may serve more than 18 months."

[2] Local 57 and its attorneys had no knowledge, even on November 18, 1971, that the U. S. Attorney for Rhode Island had, some two months earlier, on September 8, 1971, successfully moved the District Court to enter an order ending the life of the first grand jury that had subpoenaed the records of Local 57.

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The continued inaccessibility to these records by the Union makes it impossible for them to properly and appropriately conduct their affairs. Accordingly, would you please make immediate arrangements to return the records, so that it would not be necessary to take court action to secure their return.

Very truly yours,

SALTER, MCGOWAN, ARCARO & SWARTZ
(s) HAROLD C. ARCARO, JR.

The record discloses no response to this letter; but the United States does not deny that this letter was received by the United States Attorney for Rhode Island. (R. 76, 77; R. 1-90)

Instead of returning to their owner the previously subpoenaed records of Local 57, after September 8, 1971, the United States Attorney for Rhode Island submitted them to another federal grand jury (hereinafter sometimes referred to as the "second grand jury") that was sworn in on or about October 19, 1971. (R. 62, 85)

This second grand jury on April 20, 1972, returned an "embezzlement" and "conspiracy" indictment (Indictment No. 7846) against three Local 57 officers. (R. 62, 85)

The indictment by this second grand jury was based on Local 57 records subpoenaed a year before, in April of 1971, by the first grand jury whose life had expired on September 8, 1971. (R. 62, 85)

On May 18, 1972, Frank A. Bruzzi, Recording Secretary for Local 57, wrote the following letter to the United States Attorney for Rhode Island. (R. 58)

"Dear Sir:

We urgently request the return of the Books that

your office subpoenaed at an earlier date. These Books include our Local Minutes, Cancelled Checks and Work Records. Our Local office is finding it difficult to operate effectively without these Records.

Sincerely,

(s) FRANK A. BRUZZI
FRANK A. BRUZZI,
Recording Secretary"

On May 31, 1972, the United States Attorney for Rhode Island replied as follows. (R. 59)

"Dear Mr. Bruzzi:

This is in reply to your letter dated May 18, 1972, in which you requested the return of certain books and records subpoenaed by the Federal Grand Jury sitting in this district.

These records are still required as part of an investigation being conducted by the Grand Jury and cannot be returned at this time; however, when they are no longer needed, they will be returned to you immediately.

Sincerely,

(s) S. MICHAEL LEVIN
S. MICHAEL LEVIN
Special Attorney
U. S. Department of Justice"

The Third Grand Jury

The reference in this May 31, 1972 letter to such records "being required as part of an investigation being con-

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ducted by the Grand Jury" did not refer to the first grand jury that had originally subpoenaed these records in April of 1971 (and had been discharged on Sept. 8, 1971); nor did this reference refer to the second grand jury that had not subpoenaed these records but had returned Indictment No. 7846, on April 20, 1972, on the basis of such records. (R. 77)

The grand jury referred to in this letter of May 31, 1972, was yet another, or third, federal grand jury. (R. 77)

The Union's Motion For Return Of Its Records

On June 16, 1972, Local 57 filed with the federal District Court for Rhode Island a MOTION FOR RETURN OF RECORDS SUBPOENAED BY A NOW DEFUNCT FEDERAL GRAND JURY. (R. 1, 50-52)

This pleading represented that:

> "On information and belief, the U.S. Department of Justice Attorney S. Michael Levin has improperly and illegally denied the request of Local 57 for the return of its records, on the erroneous assumption that once a federal Grand Jury has subpoenaed records, such records may be used by any other federal government personnel, and agencies, including other federal Grand Juries, during and even after the subpoenaing Grand Jury has ended its legal existence."

This pleading prayed:

> "... that this Honorable Court order the return of all such original records of Local 57, subpoenaed by a now defunct federal Grand Jury, or, alternatively, that this Court order that the United States furnish

> Local 57 with photocopies of all of its original records produced in response to the subpoena of the now defunct federal Grand Jury." (R. 51, 52)

After the filing of this pleading by Local 57, on June 16, 1972, the Department of Justice, on July 10, 1972, filed a MOTION TO IMPOUND RECORDS SUBPOENAED BY FEDERAL GRAND JURY. (R. 1, 62, 63) This motion referred to: the grand jury subpoena duces tecum enforced by the Court's order of March 25, 1971 (par. 1); to the fact that this subpoenaing grand jury had previously gone out of existence on September 8, 1971 (par. 2); to the fact that a subsequent grand jury sworn in on April 20, 1972, had returned an indictment (No. 7846) against three Union officials (par. 3); and that the previously subpoenaed records were "material as evidence in the pending prosecution". This motion prayed "that an Order issue impounding these records in the custody of the United States Department of Justice until the termination of the prosecution under Indictment No. 7846."

On July 17, 1972, the federal District Court held a hearing, with respect to these motions of Local 57 and the Department of Justice. (R. 65-68)

Counsel for Local 57 argued:

> "I think it is absolutely improper to deny to the owner of records possession and custody of these records long after they have served their apparent purpose when they were subpoenaed by a grand jury that has since gone out of existence." (R. 69, 70)

At no point during this hearing in July, 1972, did the Department of Justice offer any evidence to the District Court, either documents or testimony of witnesses, in support of its motion to impound. Not even an affidavit was

offered to the District Court in support of the Department of Justice's motion to "impound" in the custody of that Department this mass of Local 57 records.

The only support offered for this motion to "impound" was the representation of a Department of Justice attorney (Mr. Levin) to the District Court that all these records would be "material" in the prosecution of Indictment No. 7846 against three Local 57 officers. After the accuracy of this representation was challenged (R. 81) by Union counsel, at this hearing on July 17, 1972, the record discloses (R. 82) the following concession by the Department of Justice attorney(Mr. Levin):

> "The COURT: Does the Government have a need for all of these records. I have no comprehension—
> Mr. LEVIN: I will say this, your Honor, candidly with the Court, that the Government in the pending prosecution does not need all of these records."

Notwithstandng this concession, at the conclusion of this hearing on July 17, 1972, the District Court (Judge Edward W. Day) delivered the following oral opinion from the bench (R. 85, 86):

> "The COURT: In this action Local 57 of the International Union of Operating Engineers and John A. White, Jr. seek the return of certain subpoenaed records while the Government seeks the entry of an order by this Court impounding those self-same records.
> "From representations made to the Court in the motions that have been filed and orally by counsel it appears that a federal grand jury for this district began its deliberations on October 20, 1970 and thereafter issued a subpoena duces tecum for the produc-

tion of certain records of Local 57, which included cancelled checks involved in alleged embezzlement charges as set forth in Indictment No. 7846 in the file of this court. That grand jury, which began its operations on October 20, 1970, was discharged on September 8, 1971 but the records which had been subpoenaed from the Union were not returned even though a letter from the Union's attorney requested return of the records in order to avoid, according to him, the necessity of court action to secure the records. Apparently nothing further was done with respect to these records after the mailing of that letter.

"In April of 1972 a second federal grand jury had begun its operations on October 19, 1971 and returned said Indictment No. 7846 which charges the defendants therein with embezzlement of Union funds and conspiracy.

"The law is clear that a grand jury is required to return to their owner any documents which it has subpoenaed when it has completed its consideration of them or when its existence has ended; and if the records are not returned, the owner thereof can petition the court for return of the records. See *Application of Bendix Aviation Corp.*, 58 F. Supp. 953 (S.D. N.Y. 1945); *John Rosenblum, Inc.* v. *Gillespie*, 187 F. Supp. 258 (S.D. N.Y. 1960).

"In the *Bendix* case, however, the court, after stating its opinion that the owner of the records subpoenaed by a grand jury was entitled to their return went on to state that that return order would be stayed so that the Government could move for the impounding of said papers in the public interest.

"That is just what has happened here. The Government has moved for the impounding of said records and papers until termination of the prosecution of

Indictment No. 7846 on the grounds that those documents and records are material as evidence in the prosecution of the defendants in said Indictment No. 7846.

"It seems to the Court that the Government is entitled to the relief that it seeks and that the documents and records should be impounded until Indictment No. 7846 has been tried or otherwise disposed of. The Government's motion to impound is granted. The motion of the plaintiff for return of said records is denied and his objection to the Court's ruling is noted."

On July 21, 1972, the District Court entered its order denying the motion of Local 57 for return of its records and granting the motion of the United States that such be impounded with the Department of Justice. (R. 89)

On July 27, 1972, Local 57 filed a timely notice of appeal under Rule 4, Federal Rules of Appellate Procedure. (R. 90)

The Court of Appeals affirmed the July 21, 1972, order of the District Court by the one-sentence MEMORANDUM AND ORDER, entered December 12, 1972, set out as Appendix A (page 30) of this petition.

Reasons for Granting the Writ

I. THIS CASE DISCLOSES A STILL CONTINUING UNCONSTITUTIONAL "SEIZURE" OF A MASS OF RECORDS OF LOCAL 57, WITHOUT A SHOWING OF "REASONABLENESS" BY THE GOVERNMENT, IN VIOLATION OF THE FOURTH AMENDMENT RIGHTS OF LOCAL 57; SUCH A "SEIZURE" CONFLICTS IN PRINCIPLE WITH CASES DECIDED BY THE SUPREME COURT.

(a) *The "seizure" in March, 1971.*

In resisting enforcement of the broad grand jury subpoena issued for its records, at the original hearing in

March, 1971, Local 57 argued that the District Court had an obligation to inquire into the "reasonableness" of a so broadly-worded grand jury subpoena. (R. 15-17).

The Fourth Amendment imposes a "reasonableness" requirement on what a federal grand jury may subpoena. In *United States* v. *Gurule,* 437 F.2d 239 (C.A. 10, 1970), *cert. denied, Baker* v. *United States,* 403 U.S. 904 (1971), the court, relying on Supreme Court expressions, enumerated three "components" which should be looked to in measuring the reasonableness of a grand jury subpoena (page 241):

> "They are (1) the subpoena may command *only the production of things relevant to the investigation being pursued;* (2) specification of things to be produced must be made with reasonable particularity and (3) production of records covering only a reasonable period of time may be required." 437 F.2d at 241. (Emphasis supplied.)

In *Hale* v. *Henkel,* 201 U.S. 43 (1906) a grand jury investigating alleged violations of the Sherman Anti-trust Act subpoenaed all documents relating to any agreements between one company and six other companies from the date of the organization of the first company, all correspondence between the first company and the six other companies, all reports made or accounts rendered by the six companies to the first company, any agreements or contracts between the first company and four companies, and all letters received by the first company since the date of its organization from 13 other companies. The Supreme Court observed this was tantamount to requiring the production of all the books, papers, and documents found in the office of the first company and was as indefensible as

a search warrant written in the same broad terms. 201 U.S. at 77. The test used by the Court was reasonableness. 201 U.S. at 76. The Court pointed out that the required production of these documents could be found reasonable *only on a showing of necessity or materiality to the matter under investigation.* 201 U.S. at 77.

An unexplained broad or general subpoena for a corporation's (or Union's) records, as in this case, also falls under the condemnation of *Federal Trade Commission* v. *American Tobacco Co.,* 264 U.S. 298 (1924). There the Court held that a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power will not be attributed to Congress unless expressed in the most explicit language and access is confined to such documents *as are relevant to the matter under investigation* 264 U.S. 306.

In the instant case counsel for the United States in effect argued to the District Court that this broad grand jury subpoena had to satisfy no "relevancy" requirement; but simply had to meet two requirements: (1) That the grand jury was acting within the scope of its duties (on which point, no evidence was subsequently offered); and (2) That the grand jury had "specified" in its subpoena what documents it sought. (R. 22, 23)

Without hearing any testimony, or receiving any evidence (not even an affidavit was offered to the Court), the District Court adopted this reasoning of a Department of Justice attorney and upheld the broad demands of this grand jury subpoena on the ground that it "itemizes" what the grand jury sought. (R. 32, 33) The District Court thus ignored an essential requirement for enforcement of a grand jury subpoena, viz., the requirement of "rele-

vancy", that a grand jury subpoena is not reasonable unless it commands the production of things relevant to some investigation then being pursued by the subpoenaing grand jury.

(b) *The subsequent "seizure" in September, 1971.*

After the federal grand jury (which on April 1, 1971, obtained the records of Local 57 through the District Court's enforcement of the subpoena duces tecum dated March 19, 1971) ceased to exist some five months later on September 8, 1971, such records should have been returned to their owner, Local 57. *Application of Bendix Aviation,* 58 F.Supp. 953 (D.S.D. N.Y., 1945); *John Rosenblum, Inc.* v. *Gillespie,* 187 F.Supp. 258 (D.S.D. N.Y., 1960).

Instead, the United States attorney for Rhode Island, without any authority from the federal District Court that had empanelled and later discharged such grand jury, and without the authority or knowledge of the owner of such records, Local 57, "seized" and held these records after September 8, 1971. Later it submitted them to another federal grand jury (which had not subpoenaed them) empanelled on October 19, 1971. This "second grand jury" in April, 1972, returned an indictment (No. 7846) against three Local 57 officials, which indictment the Department of Justice (and the District Court, and the Court of Appeals) now relies upon as justification for continuing to deny to Local 57 its own records, or even photocopies thereof.

The United States Attorney for Rhode Island had no authority to "seize" this mass of records of Local 57 after September 8, 1971. As the District Court stated in *Application of Bendix Aviation, supra,* at page 954:

"Neither the Grand Jury nor the Department of Justice has the authority to impound papers which it is deemed in the public interest to preserve."

The federal grand jury whose life expired on September 8, 1971, could not exercise its exclusively investigative and accusing powers (which ended in any event on September 8, 1971) with a view to assisting the Department of Justice in its subsequent prosecutorial functioning. A federal grand jury is not a tool of the prosecutor "contrary to what seems the prevailing general belief". *In re Grand Jury Subpoena to Central States, Southeast and Southwest Areas Pension Fund,* 225 F.Supp. 923, 925 (D.N.D., Ill. 1964). The only proper connection between a United States attorney and a federal grand jury is that he acts as a legal advisor to it. *United States* v. *Smyth,* 104 F.Supp. 283, 294, footnote 44 (D.N.D., Calif., 1952). Since a federal grand jury is not the agent or tool of the Department of Justice, it follows that Department cannot use the subpoena powers of a federal grand jury as if they were meant for its benefit.

Unlike the powers given to other federal departments, Congress has not given summonsing, or subpoena, powers to the Department of Justice, to aid it in its pre-trial prosecutorial functioning. When, therefore, the Department of Justice in this case on September 8, 1971, "seized" records subpoenaed by a federal grand jury whose life ended on that day, the Department arrogated to itself a summonsing or subpoena power that Congress had not seen fit to confer upon it. In effect, the Department of Justice unconstitutionally "seized" all such papers, to which it was not entitled under any statutory or case authority, in violation of the Fourth Amendment rights of the owner of such papers, Local 57.

The instant case has a parallel in *Silverthorne Lumber*

Company, Inc. v. *United States,* 251 U.S. 385 (1920). There, too, a United States attorney "without a shadow of authority" illegally seized and used papers of a corporation, on the justification that they contained evidence of crime which he intended to submit to a federal grand jury. The following is from the Supreme Court opinion (251 U.S. 385, at pp. 390, 391):

> "The facts are simple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States Marshal *without a shadow of authority* went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, etc. were taken at once. *An application was made as soon as might be to the District Court for a return of what thus had been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury.* (Emphasis supplied.)

In *Silverthorne* the courts gave no sanction to such an illegal seizure and use of corporate records by the Department of Justice. The District Court there ordered a return of the seized records to their corporate owner. The Supreme Court went further. After the return of such records, a federal grand jury issued a subpoena for them

in proper form. When the corporation refused to comply, it was cited for contempt. The Supreme Court reversed this contempt conviction on the ground that the government, through this proper grand jury subpoena, was attempting to derive a benefit from knowledge gained by the government's own prior wrong.

(c) *The final "seizure" in July, 1972.*

When in June, 1972, Local 57 sought from the District Court return of its records subpoenaed by a then defunct federal grand jury, the Department of Justice countered with a motion to "impound" this mass of records in its custody. Both motions were heard on July 17, 1972.

As justification for an "impounding" order, the Department cited the product of its own prior wrongdoing; that is, it cited its alleged need for these records to prove Indictment No. 7846, brought against three Local 57 officials, which indictment the Department of Justice had obtained through its own prior wrongful "seizure" and use of records of Local 57 on and after September 8, 1971.

The District Court in July, 1972, granted the Department of Justice's motion and simultaneously denied the motion of Local 57 for return of its records, or photocopies thereof.

The granting of this "impounding" motion was based on nothing more than a government attorney's conclusory statement to the District Court that all these Local 57 records (covering a 5-year period) would be "material" in prosecuting Indictment No. 7846. (R. 62)

This order was yet another unconstitutional "seizure" of these records of Local 57, in violation of the latter's Fourth Amendment rights. No federal court has discretion

to violate the Fourth Amendment either by a broad "impounding" order, or by enforcing a broad grand jury subpoena the "relevancy" of whose contents to a grand jury matter under investigation has not been established. In *United States* v. *Birrell,* 242 F. Supp. 191 (D.S.D.N.Y., 1965), the Court stated:

> *Page 202*
>
> "After books and records have been produced before the Court in obedience to a subpoena duces tecum or other proper order requiring their production, the Court may, *on a proper showing,* 'impound' them — that is, take them into the custody of the Court (without, of course, in any way affecting title).
>
> "It has been said: 'That impounding is a drastic measure may be seen from the reluctance with which courts grant it.' Hagan, Impounding and the Subpoena Duces Tecum, 26 Brooklyn L. Review 199, 230 (1960).
>
> *Pages 203, 204*
>
> "Moreover, the orders of a Referee in Bankruptcy are surely as subject to the Fourth Amendment as are orders of the Commissioner *and of this Court.*
>
> * * *
>
> *Page 204*
>
> "The impounding order of Referee Brink is no justification for seizure of the property because (a) it was in excess of any authority of the Referee, (b) *it was issued without any sufficient basis in fact,* and (c) *it was in violation of the Fourth Amendment.*" (Emphasis supplied.)

Indeed, the record in this case discloses that the Department of Justice repudiated its own conclusory state-

ment to the District Court that all these records were material in prosecuting Indictment No. 7846. At the hearing on July 17, 1972, a Union attorney had represented "as an officer of this court, that certainly 95 per cent of these records have nothing to do with the pending indictment." (R. 81) Immediately thereafter the record (R. 82) discloses this concession by the Department of Justice attorney (Mr. Levin):

> "The Court: Does the Government have a need for all of these records. I have no comprehension —
> Mr. Levin: I will say this, your Honor, candidly with the Court, that the Government in the pending prosecution does not need all of these records."

Notwithstanding this concession the District Court granted the motion to "impound" Local 57's records, including records the Department had conceded it did not need in prosecuting Indictment No. 7846.

The "unreasonableness" of this action is further indicated by the fact that the Department of Justice could have photocopied any records needed to prosecute Indictment No. 7846, and returned all the original records to their owner, Local 57; or as Local 57's motion for return of its records suggested, if the Department of Justice could by some evidence establish a justification for retaining *some* of Local 57's *original* records, the Department could furnish Local 57 with photocopies[3] of these and return all other original records. (R. 50-52)

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[3] In *Application of Bendix Aviation Corp.*, 58 F. Supp. 953, 954 (D.S.D. N.Y., 1945), relied upon by the District Court, the opinion indicates that imposing on the government the burden of furnishing photocopies was made the price of even temporarily denying the return of the original records to their owner.

II. THE PROCEEDINGS IN WHICH THE FEDERAL DISTRICT COURT, AND THE COURT OF APPEALS APPROVED THE DEPARTMENT OF JUSTICE'S AUTHORITY TO "SEIZE" AND HOLD THIS MASS OF PETITIONER'S RECORDS WERE DEVOID OF EVIDENTIARY SUPPORT; UNDER THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT THIS IS AN INDEPENDENT GROUND ON WHICH THE SUPREME COURT SHOULD GRANT CERTIORARI.

This record discloses a total lack of evidence in support of the three "seizures" of petitioner's records. No witness testified and no documents were offered (not even an affidavit) in support of the first seizure in March, 1971, when the grand jury subpoena was enforced. The record discloses no evidence, not even an attempted explanation, in support of the second seizure by the United States Attorney on September 8, 1971, when the grand jury that had subpoenaed these records was discharged. Finally, no witness testified and no documents were offered (not even an affidavit) in support of the third, and still continuing, seizure in July, 1972, when the District Court denied Local 57's attempt to recover its records and entered an "impounding" order in favor of the Department of Justice "until the termination of the prosecution under Indictment No. 7846". (R. 63, 89) [4]

Not only does the Fourth Amendment confirm the right

[4] As of the date this petition for certiorari is being filed, the federal government has had exclusive possession of Local 57's records, covering this 5-year period, for some twenty-two months (from April, 1971, to February, 1973). The practical effect of this "impounding" order is to extend this exclusive possession into the indefinite future. Indictment No. 7846 has not yet been tried. Since one of the defendants named therein (John A. White, Sr.) has been found, by a court-appointed psychiatrist, unable to stand trial, the Department of Justice can indefinitely prevent the "termination" of that prosecution, by declining to dismiss the indictment as to him, on the theory his mental condition may yet change.

of the people to be "secure" in their "papers" and "effects" against "unreasonable . . . seizures"; the Fifth Amendment provides a right to procedural "due process". The Supreme Court has held that "due process" is violated (and certiorari should be granted) when rights are taken away in proceedings devoid of evidentiary support. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *Washington* v. *United States,* 357 U.S. 348 (1958).

This violation of procedural "due process" was further aggravated by an appellate technique initiated by the Department of Justice. In appealing to the Court of Appeals, counsel for Local 57 printed as APPELLANT'S APPENDIX the proceedings below. The Department of Justice thereafter filed with its BRIEF FOR APPELLEE a 28-page document, entitled APPENDIX, *containing documents that had not been offered in evidence before the District Court.*[5]

Thus the Department ostensibly invited the Court of Appeals to decide the case *on documents not offered in evidence before the District Court.* In fact, not one of these documents — except for Indictment 7846 — had been mentioned by the District Court in justification of its "impounding" order. (R. 85, 86) What is even more disturbing than the Department of Justice's resort to this unfair and irregular procedure is that the Court of Appeals did apparently rely on these "documents". The MEMORANDUM AND ORDER of the Court of Appeals, affirming the "impounding" order, states:

> "Upon a review of the record, including the transcript of the hearing of July 17, 1972 *and the supporting documents, and particularly pages 14-22*

[5] This APPENDIX included Indictment No. 7846, another indictment (Indictment No. 7757), a MOTION UNDER RULE 16(b), pertaining to Indictment No. 7846, and an ORDER partially granting a MOTION FOR BILL OF PARTICULARS in Indictment No. 7846.

> *thereof,* the order of the District Court of July 21, 1972 is affirmed." (Emphasis supplied.)

Since no documents were offered in evidence before the District Court, this reference to "supporting documents" could only be a reference to documents in the Department of Justice's 28-page APPENDIX. This was a clear violation of procedural "due process" as the Supreme Court itself has indicated in *Garner* v. *Louisiana, supra,* at page 173. That case condemned an attempt by the state of Louisiana, as a litigant, to achieve by argument to an appellate court "what it is required by due process to do at the trial."

III. THERE IS A CLEAR CONFLICT IN PRINCIPLE BETWEEN THE FIRST CIRCUIT'S HANDLING OF THIS CASE AND OPINIONS OF THE SEVENTH CIRCUIT.

In *In Re Dionisio,* 442 F.2d 276 (C.A. 7, 1971), certiorari granted *sub nom. United States* v. *Dionisio,* No. 71-229, May 30, 1972, 40 L.W. 3568, the Seventh Circuit stated (page 280):

> "We believe the proposition to be clearly established that under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure."

That opinion goes on to recite (page 281) that a "bald statement" by such officials that they need certain physical evidence is not such a showing. See also *In Re September 1971 Grand Jury,* 454 F.2d 580 (C.A. 7, 1971), certiorari granted *sub nom. United States* v. *Mara,* No. 71-850, May 30, 1972, 40 L.W. 3568.

In the instant case the District Court[6] relieved the government of any burden of proving the "reasonableness" of its alleged need for records of Local 57. At the original hearing in March 1971, the District Court imposed on Local 57 the burden of proving the grand jury's asserted need for Local 57's records to be "unreasonable". See page 9 of this petition for certiorari. At the later hearing in July, 1972, the Department of Justice was again relieved of any burden of proving the "reasonableness" of its alleged continuing need for this mass of Local 57 records, because it then obtained a broad "impounding" order, in its favor, without offering any evidence, merely on the "bald statement" of one of its representatives (subsequently repudiated) that it had a continuing need for all these records.

Conclusion

For these reasons a writ of certiorari should issue to review the MEMORANDUM AND ORDER of the First Circuit entered December 12, 1972 (Appendix A).

Respectfully submitted,

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[6] And necessarily the Court of Appeals, which expressed no disapproval of what the District Court did.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1277.

IN RE
GRAND JURY SUBPOENA OF
JOHN A. WHITE, President,
International Union of
Operating Engineers, Local 57.

Before ALDRICH, McENTEE,
and CAMPBELL, *Circuit Judges.*

MEMORANDUM AND ORDER
Entered: December 12, 1972

Upon a review of the record, including the transcript of the hearing of July 17, 1972 and the supporting documents, and particularly pages 14-22 thereof, the order of the District Court of July 21, 1972 is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Mssrs. McGowan and Davies.]